



Co-funded by the Criminal Justice Programme of the European Union 2014-2020

Directive 2010/64/EU on the right to interpretation and translation

1. The scope and content of the Directive

The Directive on the right to interpretation and translation in criminal proceedings, which was the first to be legislated for under the procedural rights 'roadmap' passed by resolution of the Council on 30 November 2009, was adopted by the European Parliament and the Council on 20 October 2010, with a transposition date of 27 October 2013. Member States were required to introduce laws, regulations and administrative provisions necessary to comply with the provisions of the Directive no later than the transposition date (Art 9(1)). The Directive 'lays down common minimum rules to be applied in the fields of interpretation and translation in criminal proceedings with a view to enhancing mutual trust among Member States' (Recital 12). As the Directive recognises, the right to interpretation and translation for those who do not speak or understand the language of the proceedings is enshrined in Article 6 of the European Convention on Human Rights (ECHR), and the purpose of the Directive is to facilitate the application of that right in practice (Recital 14). The ECHR Art 6(3)(c) provides that a person charged with a criminal offence has the right to free assistance of an interpreter if he or she cannot understand the language used in court. In addition, Arts 5(2) and 6(3)(a) provide that everyone who is arrested or charged with a criminal offence must be informed promptly in a language that they understand of the reasons for arrest and the nature and cause of the charge against them. There is no explicit mention of a right to translation in the ECHR, but this was implied in *Kamasinski v Austria* (19 December 1989 No 9783/82).

1.1 'Criminal proceedings'

Generally, this Directive (and the other Directives adopted under the procedural rights roadmap) applies to suspected and accused persons in 'criminal proceedings', and to persons subject to proceedings pursuant to Framework Decision 2002/584/JHA (European Arrest Warrant proceedings). The meaning of 'criminal proceedings' is not defined in the Directive – which is significant because a number of Member States have administrative law systems which, whilst not explicitly criminal, have some of the characteristics of criminal proceedings. The Treaty of the European Union, Art 6(3), provides that fundamental rights as guaranteed by the ECHR shall constitute general principles of EU law. Further, the EU Charter of Fundamental Rights (the EU Charter) confers rights on persons 'charged' with a criminal offence and also refers to 'criminal proceedings' without defining the meaning of the term. Article 52(3) of the EU Charter provides that [i]n so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention'.

Therefore, the term 'criminal proceedings' should be interpreted in a way that is consistent with ECtHR jurisprudence. The ECHR does not use the term 'criminal proceedings' but, as noted, confers rights on persons 'charged with a criminal offence'. The ECtHR has recognised that, whilst 'removing certain forms of conduct from the category of criminal offences under domestic law' can serve the interests of both the individual and the administration of justice, there is a danger that classifying offences as regulatory can undermine the fundamental rights contained in the ECHR Arts 6 and 7 (ECtHR 21 February 1984, *Ozturk v Germany* no 8544/79). Therefore, the domestic classification is not

necessarily determinative, and three factors should be taken into account in determining whether a person is the subject of a *criminal* charge: the domestic classification; the nature of the 'offence'; and the nature and degree of severity of any possible penalty (*Engels v Netherlands* (1979-80) 1 EHRR 706).

It is suggested, therefore, that in determining the scope of this Directive (and the other Directives adopted under the procedural rights roadmap) in respect of proceedings in domestic law, Member States should have regard to the approach taken by the ECtHR to the question of whether a procedure amounts to a 'criminal charge'.

1.2 The minor offences exemption

However, the Directive provides for a 'minor offences' exception even though such offences are, by reference to ECtHR jurisprudence, properly to be regarded as 'criminal'. Thus Art 1(3) of the Directive provides that where the law of a Member State provides for the imposition of a sanction regarding minor offences by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed to such a court, the Directive only applies to the proceedings before the court following such an appeal. In other words, the right to interpretation and translation does not apply in respect of such cases unless and until the accused person appeals. This exception may create practical difficulties since, at the initial stages, it may not be known whether the matter is to be dealt with by such a procedure. Frequently, such a decision is only made part-way through the initial investigative process. The proper approach in such circumstances is for the suspect or accused to be afforded the right to interpretation and translation at least until a decision is made to deal with the matter by way of a 'minor offences' procedure (and, of course, the right may be re-applied in the event of an appeal). It is worth noting that ECtHR jurisprudence does not provide for such an exemption.

1.3 When do the rights commence?

The rights in the Directive commence from the time that a person is made aware by the competent authorities, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence (Art 1(2)). This formulation is common to a number of the other Directives. It follows from the formulation adopted by the ECtHR in relation to the meaning of 'charge' under Art 6 of the ECHR (ECtHR 15 July 1982 *Eckle v Germany* No 8130/78). Therefore, the Directive applies not only to persons who have been arrested and detained, but could apply at an earlier stage and/or where a suspect or accused is dealt with without being arrested.

1.4 When do the rights end?

The rights in the Directive apply until the conclusion of the proceedings, which is understood to mean the final determination of the question whether they have committed the offence, including, where applicable, sentencing and the resolution of any appeal (Art 1(2)). This has been considered in the Court of Justice of the European Union (CJEU) decisions in *István Balogh* Case C-25/15, and *Gavril Covaci* C-216/14 (see further below).

1.5 The right to interpretation

The right to interpretation applies to suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned, who must be provided without delay with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings (Art 2(1)). It is clear, therefore, provided that the conditions are satisfied, that interpretation must be provided both of what the suspect or accused says, and what is said by others to them (and, arguably, of what is said in their presence).

In addition, interpretation must be provided for communication between a suspected or accused person and their lawyer if it is necessary for the purpose of safeguarding the fairness of proceedings and is in direct connection with any questioning or hearing, or the lodging of an appeal or other procedural application (Art 2(2)). The suspect or accused person must be able, inter alia, to explain their version of events to their lawyer, point out any statement with which they disagree, and make their lawyer aware of any facts that should be put forward in their defence (Recital 19).

The rights referred to in Art 2(1) and (2) include 'appropriate assistance for persons with hearing or speech impediments' (Art 2(3)).

There is no provision for the waiver of the right to interpretation.

1.6 The right to translation

Suspected or accused persons who do not understand the language of the proceedings must, within a reasonable period of time, be provided with a written translation of all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings (Art 3(1)). 'Essential documents' include any decision depriving a person of their liberty, any charge or indictment, and any judgement (Art 3(2)). However, the right does not apply to passages of essential documents that are not relevant to enabling the suspect or accused person to have knowledge of the case against them (Art 3(4)).

Oral translation, or an oral summary, of essential documents is permitted provided that it does not prejudice the fairness of the proceedings (Art 3(7)).

Unlike the right to interpretation, the right to translation may be waived if the suspected or accused person has received prior legal advice or has otherwise obtained 'full knowledge of the consequences of waiver', and that waiver is unequivocal and given voluntarily (Art 3(8)).

1.7 The right to free interpretation or translation

Member States must meet the costs of interpretation and translation irrespective of the outcome of the proceedings (Art 4). This reflects the ECtHR decision in *Luedicke, Belkacem and Koc v Germany* 28 November 1978 Nos 6210/73, 6877/75 and 7132/75.

1.8 Identifying the need for interpretation or translation

Member States must ensure that a procedure or mechanism is in place to ascertain whether suspected or accused persons speak and understand the language of the proceedings and whether they need the assistance of an interpreter (Art 2(4)). There is no specific similar requirement in respect of translation, but it follows from the basic obligation under Art 3(1) to ensure that translation is available for those who do not understand the language of the proceedings, that there should be a mechanism for identifying need.

Recital 21 states that such a procedure or mechanism implies that the competent authorities verify in any appropriate manner, including by consulting the suspected or accused person concerned, whether they speak or understand the language of the proceedings and whether they need the assistance of an interpreter. The Directive places responsibility on Member States to ensure that such procedures or mechanisms are in place, but does not determine what form they should take.

Arguably, such procedures or mechanisms need to be in place at various stages of the criminal process since the need for interpretation and translation may differ as between the different stages; for example, a suspect or accused may have sufficient understanding of the language to understand notification of their procedural rights, but insufficient to understand complex legal terms.

1.9 Ensuring independence and quality of interpretation/translation

Member States must take concrete measures to ensure that the interpretation and translation provided meets the necessary quality standards, and must endeavour to establish registers of interpreters/translators. Where they exist, Member States should facilitate access to national databases of legal interpreters and translators (Recital 31).

Member States should ensure that control can be exercised over the adequacy of interpretation and translation provided where the competent authorities have been put on notice in a particular case (Recital 24), and where the quality is considered to be insufficient to ensure the right to fair trial, the competent authorities should be able to replace the appointed interpreter (Recital 24).

1.10 Ensuring confidentiality

Member States must ensure that interpreters and translators are required to observe confidentiality regarding interpretation and translation provided under the Directive (Art 5(3)).

1.11 The right to challenge

Suspected and accused person must have a right to challenge a finding that there is no need for an interpreter, or for translation, and to complain about inadequate quality of interpretation or translation provided (Arts 2(5) and 3(5)).

2. Existing information as to implementation of the Directive

All Member States, apart from Belgium and Denmark, have informed the European Commission of at least one measure adopted by way of implementation of the Directive (as required by Art 9(2) of the Directive) (see EUR-Lex web-site at <https://tinyurl.com/y8hlz7yf>).

Note that the procedural rights Directives are not binding on Denmark (by virtue of the TEU, Protocol 22, Arts 1 and 2). Both the United Kingdom and Ireland which, under the TEU, Protocol 21, may decide whether or not to opt in to such Directives, did opt in to the Directive on interpretation and translation.

The European Rights Network - Justicia, has produced an Explanatory Guide to the Directive, and also a Training Manual and Training Workbook (available at <https://tinyurl.com/ydhr6q8m>). Justicia also published, on 31 December 2012, a report on implementation of the Directive in six EU jurisdictions (also available at <https://tinyurl.com/ydhr6q8m>).

The EU Fundamental Rights Agency published a report, *Rights of suspected and accused persons across the EU: translation, interpretation and information*, in November 2016 (available via <https://tinyurl.com/yag4jmsk>), which included a survey of implementation of the Directive in Member States. The main concerns raised in the report are as follows -

- (a) Most EU jurisdictions lack detailed guidance on how to assess the need for interpretation and translation, and practice varies considerably.
- (b) Not all Member States' legislation specifies the essential documents in respect of which translation must be provided, and where it is not specified, decisions on which documents have to be translated are largely made on a case-by-case basis. Furthermore, practitioners reported that, in practice, authorities often provide oral rather than written translations of essential documents.
- (c) The extent to which interpretation is provided for lawyer/client consultations varies from state to state, and some states impose limitations, for example, as to the maximum time for which interpretation will be provided or as to the procedural actions for which it will be provided. In some jurisdictions, eligibility for interpretation for lawyer/client communications

is dependent on the provision of legal aid, or is only provided free if the interpreter is provided by a state authority.

(d) The use of the same interpreter for both police interrogations and lawyer/client communications may present a conflict of interests, and may conflict with the principle of confidentiality.

(e) Whilst some Member States have set up registers of legal interpreters and translators, the minimum qualifications for inclusion in such registers varies both within and across states. In addition, there are no common standards on the establishment of such registers. Some states have no minimum requirements for inclusion on a register. As a result, the quality of services provided varies considerably, even in those states that do have a register. Furthermore, even in states that do have a register, there are often circumstances where interpreters or translators are appointed outside of the register scheme. In some states, national associations of interpreters and translators have established codes of conduct, or ethical codes, that help to assure quality.

It should be noted that research evidence regarding interpretation at police stations in four jurisdictions, the fieldwork for which was carried out around the time of the transposition date of the Directive, was published in J. Blackstock, et al., *Inside Police Custody: An Empirical Account of Suspects' Rights in Four Jurisdictions* (Intersentia, 2014).

The Directive on the right to interpretation and translation has been considered by the CJEU in two cases.

In *István Balogh* Case C-25/15, Balogh, a Hungarian national, was convicted in Austria of aggravated burglary and sentenced to imprisonment. That judgment was translated into Hungarian, in compliance with the Directive. The competent Austrian authorities informed the Hungarian Ministry of Justice, which transmitted the judgment to the referring court (i.e., the court that referred the matter to the CJEU) as the court with jurisdiction for the recognition of the validity of the judgement in Hungary. This was in accordance with a special procedure provided for in the law of Hungary on international mutual assistance. In accordance with the special procedure, the referring court was required to translate the judgement into Hungarian. The question referred to the CJEU was whether translating the judgment by the Hungarian court was covered by the Directive; if it was, it would have to be free of charge to the offender. The CJEU held that the special procedure for recognition of a final judgement in Hungary was, by definition, held after the final judgement of the court in Austria, as a result of which the Directive did not apply. Note that the CJEU went on to hold that the Council Framework Decision 2009/315/JHA of 26 February 2009 (on the organisation and content of the exchange of information extracted from criminal records between Member States, and the Council Decision 2009/316/JHA of 6 April 2009 (on the establishment of the European Criminal Records Information System) must be interpreted as precluding the implementation of national legislation establishing such a special procedure (which required a 'new' translation to be obtained and for the offender to pay for it).

In *Gavril Covaci* Case C-216/14, Covaci, a Romanian citizen, had been stopped by police whilst driving, on suspicion that he did not have mandatory insurance and that the proof of insurance provided by him was a forgery. The offences were dealt with under a penalty order procedure by virtue of which there is no trial unless the accused lodges an objection to the order within two weeks of the date on which it is served. When questioned by police, Covaci was provided with an interpreter (which was in compliance with the Directive since at that stage it was now known whether the minor offences exemption would apply), and he gave authorisation for the order to be served on the officials of the local court (he being of no fixed abode in

Germany). The prosecutor requested that the order be served on those authorised officials and, in accordance with German law, that any written objection be in German. The referring court referred two matters to the CJEU: (a) whether the obligation under German law requiring the objection to be in German was consistent with the EU Directive on the right to interpretation and translation; and (b) whether the procedure for service of the penalty order complied with the EU Directive on the right to information. With regard to the first matter, the CJEU decided that the circumstances, relating to service of the objection by the suspect, fell within the scope of the Directive. However, it went on to decide that the obligation under German law did not contravene the Directive 'provided that the competent authorities do not consider, in accordance with Article 3(3)... that, in the light of the proceedings concerned and the circumstances of the case, such an objection constitutes an essential document'. The court did not determine whether an 'objection' is an essential document; that was for the referring court to decide. The implication of this decision is that the Directive does cover translation of a document *into* the language used by the court. However, the wording of Article 3 of the Directive suggests that it only applies to the translation of documents from the language of the court into a language that is understood by the accused. It may be noted that the ECtHR, in *Kamasinski v Austria* 19 December 1989 No 9783/82, suggested that the right to translation does include translation *into* the language of the court. However, it is submitted that this remains to be definitively determined by the CJEU.

3. Developments in Member States

Speakers and delegates raised a number of issues concerning the implementation of the Directive on interpretation and translation.

3.1 Identifying need and the significance of the investigative stage

A delegate from Italy identified a problem with the police having responsibility for determining whether a suspect/accused has a sufficient knowledge and understanding of the relevant language. In his opinion, the police were too ready to conclude that a suspect has sufficient knowledge of Italian, and this had the potential to cause difficulties at later stages of the proceedings. In particular, if the police determined that a suspect had sufficient knowledge and understanding of Italian, it would be difficult subsequently to persuade a judge that the accused does not have a sufficient language facility. Similarly, an Irish delegate suggested that the decision taken at the police station is crucial because, in effect, that decision determines whether the accused has an interpreter at court.

This is linked to the question of what is meant by the threshold in the Directive – that the suspect or accused does not speak or understand the language of the proceedings. A speaker from Germany identified the fact that a suspect or accused may have lived in Germany for many years, have sufficient facility in German to do their job, but not have sufficient knowledge or understanding of the language for the purposes of criminal proceedings. In his view, it is necessary for decision-makers to err on the side of caution in making a decision regarding the need to interpretation or translation. However, the decision may be made more difficult because, on the one hand, some suspects/accused may pretend that they do not speak or understand the language when in fact they do whereas, on the other hand, some may be reluctant to admit that they do not speak or understand the language. Similarly, it was suggested that in Latvia, a person whose mother tongue is Russian may have lived in Latvia for many years, yet not have a sufficient knowledge of Latvian.

A number of suggestions were made regarding the issue of identifying need. It was noted, for example, that in police stations in England and Wales, there is a notice in the custody suite giving basic information in a number of languages, and suspects may be asked whether they can read any of them (although this assumes that a suspect can read). In addition, the 'letter of rights' is available online in over 50 languages, and a suspect could be asked to read the notice (or parts of it) and explain what it

says. Another approach suggested was for the decision-maker to ask people who know the suspect/accused as to their assessment of the person's language ability. It was also suggested that in borderline cases, the suspect/accused's lawyer could be asked to help identify the level of language ability.

3.2 The mode of provision of interpretation

Concern was expressed about the use of audio-only remote interpretation. It was suggested that if interpretation is provided remotely, this should be by means of audio-visual technology which has the capacity to capture the person who is speaking at any particular time.

3.3 Translation and the speed of proceedings

A particular problem was identified concerning the ability to arrange translation of documents in sufficient time. The example was given by one speaker of European Arrest Warrant proceedings in the executing state, under which the person may be transferred to the requesting state within 72 hours. It was stated that in such circumstances, it was not possible for translation to be carried out before the transfer took place, even in the case of common languages.

The Directive does permit oral translation provided that it does not prejudice the fairness of the proceedings (Art 3(7)). It was suggested by a speaker from Ireland that in practice, oral translation of the conditions of provisional release is the norm; written translation is ordered by a judge only 'if essential in the interests of justice'.

3.4 Competence, quality and register arrangements

A number of problems were identified in relation to registers of interpreters and translators, and the more general issue of competence. It was suggested that in Poland, there is a system of registration that 'works quite well', but that there is insufficient training for interpreters and translators so that they may not be sufficiently familiar with court procedures and language. In Greece, a law has been enacted, but it has not been implemented. There is no register for interpreters and translators, and it is difficult to find interpreters and translators for particular languages, especially Asian languages. Similarly, there is no register in Luxembourg, although the Ministry of Justice has a list of sworn interpreters. In Ireland, which does not have register arrangements, the issue of quality assurance has, in effect, been outsourced because interpreters and translators are provided by private companies under contract. This has attracted concerns about quality from the Irish Translators and Interpreters Association. The speaker referred to a current court case in which a company is challenging the non-renewal of a contract, the government basing its defence, in part, on an assertion of poor quality on the part of the company. It was also noted, more generally, that the question of quality assurance is critical because it is normally impossible for the police, courts or lawyers to verify the quality of interpretation in any particular case.

The problem of finding interpreters and translators for particular languages was raised by speakers and delegates from a number of countries. It was stated that Luxembourg faces particular difficulties since there are three official languages, and whilst judges, prosecutors and lawyers often speak multiple languages, problems may arise if an accused or witness does not speak or understand any of the official languages. It was suggested that judges frequently have to find a person who speaks the relevant language, for example, a civil servant or, in one case, a boutique owner, on an ad hoc basis. A particular problem arising from this is that there is no quality control, and such persons may struggle to understand criminal procedure and terminology – a problem that is not confined to Luxembourg.

EULITA (The European Legal Interpreters and Translators Association) provides guidance on setting up a national register (<http://eulita.eu>). The organisation was funded by the European Commission to

establish a pilot project designed to create a user-friendly database of interpreters and translators. However, funding has not been made available to establish the database on a sustainable basis.

3.5 Interpretation of lawyer/client communications

It appears to be common practice in Member States for the same interpreter to interpret both the police interrogation(s) of a suspect and the suspect's consultation with their lawyer, and concerns were expressed about, in particular, independence and confidentiality in such circumstances. In some countries, such as Greece, the law regarding confidentiality in these circumstances is unclear.

In some countries, eligibility for interpretation for lawyer/client communications is linked to eligibility for legal aid, which is contrary to Article 4 of the Directive, which provides that Member States must meet the costs of interpretation and translation irrespective of outcome (and, indeed, of financial circumstances of the suspect or accused). A delegate from Ireland suggested that there are significant practical difficulties in a defence lawyer arranging for interpretation, in part because of the length of time before the interpreter is paid for their work. Furthermore, eligibility for interpretation in Ireland is based on the suspect/accused being detained, and therefore those who are at liberty are not covered.

3.6 Remuneration of interpreters and translators

Concern was expressed in relation to many jurisdictions concerning the low level of remuneration for interpreters and translators which has direct consequences for quality, and also for the availability of interpreters and translators.